

January 12, 2004

Mr. Paul Currier, P.E., Watershed Management Bureau Administrator  
New Hampshire Department of Environmental Services  
P.O. Box 95  
Concord, New Hampshire 03302-0095

Dear Mr. Currier,

I would like to begin by thanking you for extending to the Business & Industry Association of New Hampshire (BIA) the courtesy of providing you and the New Hampshire Attorney General's Office (AGO) with our concerns with the Department of Environmental Service's (DES) Sediment Policy. The BIA appreciates you and the AGO affording this opportunity to us; this professional courtesy is symbolic of your continued willingness to cooperatively work with us to develop strong public policy.

The BIA is trying to appreciate and understand the derivation of the legislative authority to develop the sediment policy. It is our understanding that a policy is an interpretation of authority the DES already has in rules or statute. We recognize the fact that Clean Water Act, NH RSA 485, and the Surface Water Quality Regulations give the department a certain amount of police power for public health and safety. However, we do not see the direct nexus between these laws designed to protect the water column and the current policy which focuses on the health of organisms in and around sediments. Making that link implies that sediments and the water column are essentially identical, and that a law applicable to one also applies to the other. The BIA does not believe that direct linkage is justifiable or appropriate.

The BIA would appreciate it if the AGO would be able to define the legislative authority for this policy. Also, the BIA would like to know if there is a statutory definition for sediment, and what will be the scope of "sediment."

The BIA also has policy concerns, which the AGO might be able to clarify:

- How will and should the sediment policy be applied? While a policy is ostensibly not legally binding, from a practical standpoint, its implementation can become controlling on industry and business in ways not authorized by statute or regulation. What safeguards will there be not to make this policy bind the regulated community?
- Given the fact that sediment pollution is mobile, will it be possible for a regulated entity to be responsible for sediment on their property when up-river pollution continually migrates onto their property? (Under the assumption that sediment pollution is mobile, it is easy to imagine a scenario in which a person's sediment could go from dirty to clean to dirty in a short amount of time due to no fault of that person).
- Does this policy adequately rectify the reality that the technical precision of geomorphic characterization and ecological risk assessment is not matched by equal precision in

remediation technology? The BIA is concerned that this policy, fully implemented and taken to its logical conclusions, will not appropriately balance environmental restoration with the realities of current technology and cost.

Once again I would like to emphasize that the BIA appreciates the fact that DES and the AGO have extended us this opportunity, and that they have proactively engaged us in this process. The BIA also appreciates all the time and effort that these two state agencies have and will put into this policy. We look forward to continuing to discuss this policy and the above referenced issues in the future. If possible, it may be worthwhile for the a representative from the AGO and Mr. Currier to attend the February 18 BIA Environmental Affairs Committee Meeting in order to discuss this in greater detail.

Regards,

Michael S. Giaimo, Esq., V.P.  
Business & Industry Association of New Hampshire

Cc: DES Commissioner Michael Nolin  
DES Deputy Commissioner Michael Walls  
DES Water Division Director Harry Stewart  
BIA Environmental Affairs Chairman, Michael Donahue, Aries Engineering  
BIA Environmental Affairs Vice-Chairman, Jeffrey Mathis, BAE Systems  
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